No. 5703

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IN THE

United States Circuit Court of Appeals

For the Ninth District

SACRAMENTO SUBURBAN FRUIT LANDS COMPANY, a corporation,

Appellant,

vs.

H. A. LINDQUIST and SELMA A. LINDQUIST.

Apellees

BRIEF OF APPELLEES

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The facts in this case are similar to the other cases. The general facts relating to the statute of limitations are substantially the same as those existing in the Melin case, No. 5671, and the same arguments relative thereto are equally applicable to this case.

I.

WHETHER OR NOT THE COURT ERRED IN OVERRULING APPELLANT'S DEMURRER TO THE COMPLAINT FILED IN THE ABOVE-ENTITLED ACTION.

(a) There was no exception taken to the order overruling demurrer (Transcript, page 8). This point is not available in the absence of such exception.

Melin brief, page 3.

(b) The complaint is sufficient in that it alleges non-residence of appellant. This is a sufficient plea, and being such, appellant cannot take advantage of the statute.

Melin brief, page 4.

II.

WHETHER OR NOT THE COURT ERRED IN DENYING APPELLANT'S MOTION FOR A DIRECTED VERDICT.

(a) The same situation exists here as existed in the other cases, as to the statute of limitations. Appellant is a foreign corporation, non-resident of the state and the question of the statute of limitations is not involved.

O'Brien vs. *Big Casino Gold Min. Co.* 9 Cal. 283; 99 Pac. 209.
Point IV. Melin Brief, page 9.

(b) The statute of limitations did not as a matter of fact run.

As we pointed out in the Melin brief, page 9, the appellee, H. A. Lindquist was a cabinet maker, and the other appellee was his wife. In 1921 they lived at St. Paul, Minnesota; had never been to California; knew nothing about the character, quality or value of California lands. They were given one of the booklets "Poultry Farms and Orchard Homes," the subject matter in which is outlined in *Sacramento Suburban Fruit Lands Co.* vs. *Elm*, 29 Fed. (2d) 233. The company's agents, together with the booklet described the lands to them, and they thereafter, and on the same day, signed a contract to purchase. They remained in Minnesota until February, 1922, at which time they came to California

and moved upon the land, built their house and discovered hardpan. Mr. McNaughton, the horticulturalist of appellant came around and explained to appellees that hard-pan was something very good for fruit when it was blasted; that it contained lime and potash which the trees needed. Appellees did not discover how thick the hardpan was until they dug their well pit in the fall of 1926. They then discovered that the hardpan was 16 feet in thickness. In 1924 they planted some trees, and in 1925 some more. They cared for them and in 1927 thirty-five died. Appellee, H. A. Lindquist began to work in the Southern Pacific shops as a cabinet maker after he came here. They had no immediate neighbors, but were living in the district. They began their action on the 6th day of February, 1928.

We think that appellees were excused from discovering the falsity of the representations between the 23rd day of February, 1922 and the 6th day of February, 1925, by their ignorance of farming, fruit raising and soil; by their ignorance of California conditions; by the difficulties incumbent upon ascertaining the facts; the land lying in a large district similarly situated; their being under the dominance of appellant and its supposed experts; the false statements made by McNaughton calculated to continue them in ignorance and dispel suspicion, and the fact that the matter was one difficult of ascertainment, as will appear by the fact that appellant appeared at the trial with experts endeavoring to prove that the representations were not false.

Under the authorities cited in the Melin brief, No. 5671, pages 9 et seq, we respectfully submit that there

was nothing in the present case which would require appellees to investigate the question as to whether or not they had been defrauded. Particularly do we call the court's attention to

> *MacMahon* vs. *Grimes*, 275 Pac. 440 at 445, and *Nichols* vs. *Moore*, 181 Cal. 131

where the true rule is stated concerning the duty of a defrauded party to investigate.

III.

WHETHER OR NOT THE COURT ERRED IN INSTRUCTING THE JURY ON THE SUBJECT OF THE REPRESENTATIONS CLAIMED TO HAVE BEEN MADE BY APPELLANT TO APPELLEES.

(a) The only exception to the court's instructions in the above regard is as follows:

> "We except to the charge as a whole; and particularly, to the instructions on the subject of representations claimed to have been made by defendant to plaintiff, both as to the growing of fruit, and as to the question of value." (Transcript, page 145.)

As we pointed out in the Melin Brief, page 19, the foregoing exception is inadequate.

(b) The booklet was properly interpreted by the Court as we also pointed out in the Melin case at page 27 of the brief.

(c) Appellant then branches off into an argument as to whether or not a representation of value is a representation of fact or a matter of opinion. Under the cases cited in the Melin brief at page 6, et seq., and particularly the case of *Harris* vs. *Miller*, 196 Cal. 8 at

13, representations of value are representations of fact under the circumstances of this case, as a matter of law.

(d) The argument made under this sub-head concerning the court's statement that the book says that it is proven beyond a doubt that the lands are fruit lands is without any legal foundation. The book did make that statement as has been so often pointed out.

IV.

WHETHER OR NOT THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THE DISTINCTION BETWEEN REPRESENTATIONS OF FACT AND MATTERS OF OPINION, AS REQUESTED BY APPELLANT.

(a) The only exception to this is found as follows:

> "Also to the failure of the court to give defendant's proposed instruction No. 4, concerning distinctions between representations and matters of opinion." (Transcript, page 145.)

As we pointed out in the Melin brief, page 19, this method of excepting is insufficient.

> *Alaska S. Co.* vs. *Katzeek,* 16 Fed. (2d) 210.
> *Killisnoo Pac. Co.* vs. *Scott,* 14 Fed. (2d) 86.

(b) All of the arguments under this head beginning with paragraph III, subdivision (c) page 6 et seq of the Melin brief, No. 5671, are equally applicable here. We respectfully request that our arguments there may be considered in this case.

V.

WHETHER OR NOT THE COURT ERRED IN

REFUSING TO GIVE THE INSTRUCTION REQUESTED BY APPELLANT REGARDING DISCOVERY OF THE REPRESENTATIONS AS TO VALUE.

(a) The only exception to this point is as follows:

> "Also to the failure of the Court to give defendant's proposed Instruction No. 5, concerning the effect of plaintiffs having been able by reasonable diligence to discover the alleged falsity of representations as to value." (Transcript, page 145.)

As we pointed out in the Melin Brief, page 19, such an exception is insufficient.

(b) The court fully instructed the jury in this regard. Beginning with page 141 of the Transcript and ending at the bottom of page 144, the court fully covered this subject.

(c) This subject is also covered in the Melin brief at page 9, et seq., thereof. All of the arguments there are equally applicable here.

(d) Defendant being a non-resident corporation, the statute of limitations is not involved.

VI.

WHETHER OR NOT THE COURT ERRED IN REFUSING TO GIVE APPELLANT'S INSTRUCTION NO. 1, UPON THE QUESTION OF THE STATUTE OF LIMITATIONS.

(a) The only exception to the failure to give this instruction is as follows:

> "We also except to the failure of the Court to

> give defendant's proposed instruction No. 1, upon the matter of the statute of limitations." (Transcript, page 145.)

The exception, as we have pointed out, is insufficient.

(b) In the Melin case, page 15, of our brief, we pointed out that the defendant is a non-resident corporation and not entitled to the benefit of the act pleaded, and that the matter of the statute of limitations is not involved.

We also pointed out that the instruction offered is erroneous in that it implies that appellee is under a duty to investigate to ascertain fraud.

> *MacMahon* vs. *Grimes,* 275 Pac. 440 at 445. 77 C. D. 356.

We submit that under the other arguments in the said *Melin* case, that the point is not well taken.

VII.

WHETHER OR NOT THE COURT ERRED IN INSTRUCTING THE JURY UPON THE QUESTION OF APPELLEE'S RELIANCE UPON THE ALLEGED REPRESENTATIONS.

(a) The only exception taken to this instruction is as follows:

> "Also to the instruction as to the question of belief on the part of the plaintiffs, and reliance thereon." (Transcript, page 145.)

Such an exception is not sufficient to call the court's attention to the matter argued by appellant under the above heading.

(b) The appellant here again launches out upon an

unwarranted attack upon the trial judge. All of these matters are referred to in the Melin brief, page 27, and we respectfully request that our arguments there may be considered in this regard.

VIII.

WHETHER OR NOT THE COURT ERRED IN INSTRUCTING THE JURY ON THE QUESTION OF APPELLEES' KNOWLEDGE OF THE FALSITY OF THE ALLEGED REPRESENTATIONS.

(a) The only exception to this is as follows:

> "Also to the instruction upon the subject of the knowledge of the falsity on the part of the defendant." (Transcript, page 145.)

As pointed out before, the exception is insufficient.

(b) The court's remarks in this regard were logical and fair. This same matter arose in the Melin case and is argued at page 27 of our brief therein.

We respectfully submit that the judgment should be affirmed.

Respectfully submitted,

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